

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7287
Summary Calendar

RUBY YARBROUGH,

Plaintiff-Appellant,

VERSUS

DONNA E. SHALALA, Secretary,
Health & Human Services

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
(EC91-CV-129)

(January 12, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Ruby Yarbrough appeals from the denial of Social Security disability benefits, supplemental security income, and disabled widow's insurance benefits. Finding no reversible error, we **AFFIRM**.

I.

Yarbrough, age 51 when her claims were heard by an administrative law judge in 1989, alleged that she became disabled in November 1987. At the time, she worked as a waitress, cook, and

¹ Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

dishwasher, and her duties required her to be on her feet for long periods of time, to bend frequently, and to carry heavy objects (including one that may have weighed up to 100 pounds).

Yarbrough suffered a stroke in 1985, but returned to work after recovering. A year and four months after her return in November 1987, she fainted while mopping at the restaurant. She applied for Social Security disability benefits, supplemental security income, and disabled widow's insurance benefits on April 20, 1988, alleging onset of disability on November 16, 1987.

A hearing before an administrative law judge was held in December 1989. In addition to Yarbrough's testimony the ALJ received other evidence, including medical records, to document her condition. In July 1990, the ALJ found that she had no impairment or combination of impairments that would allow her to qualify for the requested benefits; and that her testimony was not supported by objective medical evidence. The ALJ found that, subject to some restrictions, Yarbrough could perform her past relevant work; and that she was not disabled.²

In April 1991, the Social Security Appeals Council upheld the ALJ's decision, making it the final decision of the Secretary of Health and Human Services. In the district court, the magistrate judge also recommended affirmance; and the district court adopted that report and affirmed.

² The ALJ found that Yarbrough is unable to do work that involves lifting or carrying more than 50 pounds occasionally or 25 pounds frequently; or work that involves strenuous exertion or temperature extremes. These limitations, however, do not preclude Yarbrough from performing her past relevant work.

II.

Yarbrough contends that the ALJ erred in finding that she was not disabled, and applied an incorrect legal standard to her widow's benefits claim. On review, we determine whether the record as a whole contains substantial evidence supporting the Secretary's findings, and whether the ALJ applied the proper legal standards. **Selders v. Sullivan**, 914 F.2d 614, 617 (5th Cir. 1990); **Villa v. Sullivan**, 895 F.2d 1019, 1021 (5th Cir. 1990). "If the Secretary's findings are supported by substantial evidence, they are conclusive and must be affirmed."³ **Selders**, 914 F.2d at 617; see also **Richardson v. Perales**, 402 U.S. 389, 390 (1971). And, we "may not reweigh the evidence or try the issues de novo. Conflicts in the evidence are for the Secretary and not the courts to resolve." **Selders**, 914 F.2d at 617 (citation omitted).

A.

Yarbrough first challenges the ALJ's finding that she is not disabled. Yarbrough, of course, bears the burden of proving disability.⁴ **Id.** at 618; see also **Fraga v. Bowen**, 810 F.2d 1296, 1301 (5th Cir. 1987). In evaluating a claimant's disability, the Secretary conducts a five-step sequential analysis, determining

³ Evidence is substantial if it is relevant and sufficient for a reasonable mind to accept it as adequate to support a conclusion; it must be more than a scintilla, but may be less than a preponderance. **Richardson v. Perales**, 402 U.S. 389, 401 (1971).

⁴ Disability is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which ... has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423 (d)(1)(A).

whether (1) the claimant is not presently working; (2) the claimant has a severe impairment; (3) the impairment is one listed in Social Security regulations, or at least equals a listed impairment; (4) the impairment prohibits the claimant from doing past relevant work; and (5) the impairment also prevents the claimant from doing any other substantially gainful activity. 20 C.F.R. § 404.1520; **Muse v. Sullivan**, 925 F.2d 785, 789 (5th Cir. 1991).

The ALJ found that Yarbrough has not engaged in substantial gainful activity since the onset of her disability (step one); has "severe residuals" of a stroke and suffers from high blood pressure (step two); does not have an impairment listed in, or equal to one of the impairments listed in, the regulations (step three); retains the residual functional capacity to perform her past relevant work (step four); and therefore, is not disabled.⁵

The record contains the requisite substantial evidence to support this finding. Yarbrough was examined by Dr. Fox shortly after her July 1985 stroke. Dr. Fox found that she walked and spoke well, that her memory was not impaired, her vision was grossly normal, her manual manipulation was good, the grip and motor strength in Yarbrough's left hand, leg and arm were decreased, but that her motor strength was otherwise normal. Dr. Crawford, who examined Yarbrough at the direction of the Secretary, in connection with her benefits claims, found in June 1988 that

⁵ Because the ALJ found that Yarbrough could perform her past relevant work, it was not necessary to consider step five. *E.g.*, **Crouchet v. Sullivan**, 885 F.2d 202, 206 (5th Cir. 1989) (finding that the claimant is not disabled, at any point in the sequential inquiry, terminates the inquiry).

Yarbrough walked normally but had a somewhat diminished grip in her left hand, and that her hypertension was poorly controlled.

In April 1990, Dr. Hollister examined Yarbrough, also at the Secretary's direction, and found no functional limitations. And, also in April 1990, Dr. Crawford found that Yarbrough could sit, stand, and walk normally, and could lift ten to fifteen pounds; the weight limitation was based not on Crawford's diagnosis, but on the recommendation of a cardiologist whose report is not in the record. Crawford also found that Yarbrough could climb, kneel, crouch, and stoop occasionally, and had no impairment in feeling, pushing, pulling, speaking, seeing, or hearing. Although Crawford found Yarbrough could not balance or crawl, she had no work limitations.

In contrast to Drs. Fox, Crawford, and Hollister, Yarbrough and her treating physician, Dr. Giffin, opine that she is disabled. Dr. Giffin treated Yarbrough after her July 1985 stroke, and recommended medication to control her blood pressure. In September 1985, April 1987, and May 1988, Dr. Giffin stated that Yarbrough was disabled and unable to work; however, the clinical basis for this conclusion is less than clear. Further, Yarbrough was working when Dr. Giffin made several of these findings. In May 1990, Dr. Giffin found that Yarbrough was unable to lift anything, or to climb, crouch, or stand or walk for more than four hours at a time. According to Giffin, Yarbrough's ability to push, pull, reach, feel pain, and handle objects was also limited. Similarly, Yarbrough testified that she is unable to stand for more than 15 minutes at a time, and has shortness of breath and pain in her chest and left

arm.

Subjective evidence that a claimant is in pain "need not be credited over conflicting medical evidence.... At a minimum, objective medical evidence must demonstrate the existence of a condition that could reasonably be expected to produce the level of pain or other symptoms alleged." **Anthony v. Sullivan**, 954 F.2d 289, 295-96 (5th Cir. 1992) (citations omitted). And, although Dr. Giffin's findings contradict those of Drs. Fox, Hollister, and Crawford, "[c]onflicts in the evidence are for the Secretary and not the courts to resolve." **Selders**, 914 F.2d at 617.

The findings by Drs. Fox, Hollister, and Crawford constitute substantial evidence that "a reasonable mind might accept as adequate to support [the ALJ's] conclusion" that Yarbrough is not disabled. **Richardson**, 402 U.S. at 401 (citations omitted). Substantial evidence supports the Secretary's conclusion that Yarbrough is not disabled.⁶

B.

Yarbrough also contends that the ALJ applied an incorrect legal standard to her disabled widow's benefit insurance claim. Social Security Regulation (SSR) 91-3p, which became effective May 22, 1991, applies to eligibility for those benefits for December

⁶ Yarbrough also contends that, without the testimony of a vocational expert, it was error for the ALJ to find that she was disabled. This contention is meritless. The ALJ stopped analyzing Yarbrough's disability status at step four of the five-step analysis. That is, the ALJ found that Yarbrough was able to do her past relevant work; accordingly, no testimony from a vocational expert was needed to inform the ALJ about other jobs that could be available for Yarbrough in the national economy. See **Harper v. Sullivan**, 887 F.2d 92, 97 (5th Cir. 1989).

1990 - January 1991. Our court addressed its applicability in **Stokes v. Shalala**, No. 92-7706, slip op. 13-14 (5th Cir. Oct. 8, 1993) (unpublished). Under the standard for application of SSR 91-3p in effect at the time of the ALJ's decision in July 1990, Yarbrough had to meet the following test to qualify for widow's benefits: (1) that she was not married; (2) that she was between 50 and 60 years old; and (3) that she had a physical or mental impairment that, under Social Security regulations, was "so severe as to preclude her from engaging in *any gainful activity*.'" **Stokes**, slip op. at 13 (quoting **Deters v. Secretary of Health, Educ. & Welfare**, 789 F.2d 1181, 1185 (5th Cir. 1986)) (emphasis in **Stokes**).

Under this test, Yarbrough does not qualify, because the ALJ found that she was able to perform her past relevant work, and, therefore, not precluded from engaging in any gainful activity. Yarbrough contends, however, that the "any gainful activity" standard was not the correct standard to apply, because Congress later changed the third element of the standard so that a claimant need only show that she is precluded from engaging in *substantial* gainful activity. See **Stokes**, slip op. at 13; 42 U.S.C.A. § 423(d)(1)(A) (1991). Essentially, the current standard for the third element is the same as that applied to determine eligibility for other Title II benefits, such as the Social Security and Disability Insurance benefits for which Yarbrough also applied, see *supra*; see also **Stokes**, slip op. at 13-14. Because the ALJ found that Yarbrough was able to engage in substantial gainful activity,

i.e., her past relevant work, any error in failing to apply the "substantial gainful activity" test instead of the "any gainful activity" test was harmless.⁷

III.

Accordingly, the judgment is

AFFIRMED.

⁷ Accordingly, we need not reach whether the change in the regulation applied to Yarbrough's claims.